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WELLS FARGO BANK, N.A., successor  
by merger with Wells Fargo Bank  
Southwest, N.A., f/k/a Wachovia  
Mortgage, FSB, f/k/a WORLD SAVINGS  
BANK, FSB (also erroneously sued  
separately as WORLD SAVINGS BANK,  
FSB) ("Wells Fargo")

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARQUES D. HOUSTON, an individual;  
ALMA J. HOUSTON, an individual,

### **Plaintiffs.**

V.

WELLS FARGO BANK, N.A., A  
National Association; WORLD SAVINGS  
BANK, FSB, a Federal Savings Bank; and  
DOES 1 through 50, inclusive.

## Defendants

CASE NO.: CV13-9431 CAS (FFMx)

**REPLY IN SUPPORT OF  
DEFENDANT WELLS FARGO'S  
MOTION TO DISMISS FIRST  
AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: March 10, 2014

Time: 10:00 a.m.

Ctrm: 5

*[Assigned to the Hon. Christina A. Snyder, District Judge]*

Defendant WELLS FARGO BANK, N.A., successor by merger with Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB, f/k/a World Savings Bank, FSB (also erroneously sued separately as WORLD SAVINGS BANK, FSB)

1 ("Wells Fargo"), respectfully submits the following reply to plaintiffs' opposition (the  
2 "Opposition" or "Opp.") to Wells Fargo's previously filed motion to dismiss plaintiffs'  
3 First Amended Complaint (the "Motion" or "Mtn.").

4  
Respectfully submitted,

5 Dated: February 24, 2014

ANGLIN, FLEWELLING, RASMUSSEN,  
6 CAMPBELL & TRYTTEN LLP

7 By: /s/ Lynette Gridiron Winston

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10 WELL'S FARGO BANK, N.A., successor by  
merger with Wells Fargo Bank Southwest,  
N.A., f/k/a Wachovia Mortgage, FSB, f/k/a  
11 WORLD SAVINGS BANK, FSB (also  
erroneously sued separately as WORLD  
12 SAVINGS BANK, FSB)

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1       **1. PLAINTIFFS' STATE LAW CLAIMS ARE PREEMPTED BY HOLA**

2       **A. HOLA Preemption Applies To Wells Fargo Post-Merger.**

3       Plaintiffs incorrectly contend that Wells Fargo does not operate under HOLA  
 4 because it is not a federal savings association. (Opp. pp. 8:9-9:9). However, numerous  
 5 courts have held that HOLA preemption applies to conduct by Wells Fargo after the  
 6 merger regarding loans originated by World Savings Bank, FSB. In particular, the  
 7 California Court of Appeal held that HOLA preemption extends to loans originated by a  
 8 federal savings bank even after the loans are sold or assigned to an entity or investor not  
 9 entitled to preemption. *Akopyan v. Wells Fargo Home Mortg., Inc.*, 215 Cal. App. 4th  
 10 120, 143-148 (2013). Moreover, in *Williams v. Wells Fargo Bank, N.A. et al.*, 2013 U.S.  
 11 Dist. LEXIS 68615 (Carter, J. C.D. Cal. May 13, 2013), the Court held that a post-  
 12 merger claim under California Civil Code section 2923.5 was preempted under HOLA:  
 13 “The same HOLA preemption analysis applies even after the FSB merges into a national  
 14 bank, as long as the mortgage originated with an FSB.” *Id.* at \*9 (*citing Castillo v.*  
 15 *Wachovia Mortgage*, 2012 U.S. Dist. LEXIS 50926, at \*5 (N.D. Cal. April 11, 2012)  
 16 and *DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010)).  
 17 The *Williams* opinion is in line with other recent cases in the Central District. For  
 18 example, in *Gorton v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 168158 (C.D.  
 19 Cal. Nov. 27, 2012), the Court held that “[t]he relevant preemption analysis is unaltered  
 20 by the merger of Wachovia [] with Wells Fargo...HOLA preemption continues to apply  
 21 to loans originated by a federal savings bank even after those banks are merged into  
 22 national banking associations.” *Id.* at \*12 (*citing Castillo, supra*, and *DeLeon, supra*).

23       In *Mata v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 108197 (C.D. Cal.  
 24 July 31, 2013), the court noted that the deed of trust “states that the instrument ‘shall be  
 25 governed under federal law and federal rules and regulations including those for  
 26 federally chartered savings institutions.’” *Id.* at \*11.

27       Plaintiffs contracted with a Federal Savings Bank. Further, the parties  
 28 agreed to be bound by such laws under the terms of the trust deed.  
 Thus, HOLA preemption applies in this case.

1 *Id.* at \*12. “The fact that World Savings Bank merged in Wachovia and later merged  
 2 into Wells Fargo does not render HOLA inapplicable.” *Id.* at \*11-\*12.<sup>1</sup> Here, plaintiffs  
 3 also contracted with a federal savings bank and agreed to be bound by federal laws, rules  
 4 and regulations. (RJN Exh. A - Note, p. 1 ¶I.C. & p. 6 ¶12; *see also* RJN Exh. B - Deed  
 5 of Trust, p. 1 ¶1.(C) & p. 9 ¶15). Thus, it is clear that HOLA preemption applies to  
 6 plaintiff’s loan and may be asserted by Wells Fargo as to conduct after the merger.

7 **B. The Dodd-Frank Act Does Not Affect HOLA’s Preemption.**

8 Plaintiffs’ attempt to claim that the Dodd-Frank Act negates HOLA (Opp. p. 9:20-  
 9 28) is also incorrect. *See Davis v. World Savs. Bank, FSB*, 806 F. Supp. 2d 159, 167  
 10 (D.D.C. 2011) (“The new regulation, however, does not govern this case because  
 11 regulations, like statutes, cannot be applied retroactively absent express direction from  
 12 Congress. Congress did not direct retroactive application of the new regulation, and the  
 13 Dodd-Frank Act provided that section 1465 of Title 12 was enacted and amended  
 14 effective on the transfer date, i.e. July 21, 2011. [HOLA] Section 560.2 governs here  
 15 because it was the regulation in effect when the parties entered into the Pick-a-Payment  
 16 mortgage loan transaction.”); *Williams v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist.  
 17 LEXIS 17215, at \*30-\*31 (C.D. Cal. Jan. 27, 2014) (“Dodd-Frank limited the  
 18 applicability of this new preemption regime to contracts entered into after the Act’s  
 19 enactment. 12 U.S.C. § 5553.”); *Settle v. World Sav. Bank, F.S.B.*, 2012 U.S. Dist.  
 20 LEXIS 4215, at \*41-\*42 (C.D. Cal. Jan. 11, 2012) (“Section 1043 of the statute  
 21 specifically states that contracts formed prior to the passage of Dodd-Frank will be  
 22 governed by the rules and regulations in place prior to its enactment.”). Here, plaintiffs’  
 23 loan was formed in 2007. Thus, the Dodd-Frank Act does not apply.

24 **C. Plaintiffs’ State Law Claims Are Preempted By HOLA.**

25 Plaintiffs’ Opposition does not specifically address the effect of HOLA on their

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27 <sup>1</sup> *See also, Marquez v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 131364 (N.D. Cal. Sept. 13,  
 28 2013); *Babb v. Wachovia Mortg.*, FSB, 2013 U.S. Dist. LEXIS 106228, at \*11-\*13 (C.D. Cal. July 26,  
 2013).

1 state law claims. As briefed in the Motion, plaintiffs' first, sixth, eighth and ninth  
 2 claims for relief challenge the "sale or purchase of, or investment or participation in,  
 3 mortgages" and are therefore preempted under 12 C.F.R. § 560.2(b)(10). *Nguyen v.*  
 4 *Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, at 1031-1033 (N.D. Cal. 2010); *Winding*  
 5 *v. Cal-Western Reconveyance Corp.*, 2011 U.S. Dist. LEXIS 8962, at \*33-\*34 (E.D.  
 6 Cal. Jan. 21, 2011). Plaintiffs' second, third, fourth and eighth claims for relief are  
 7 based on alleged violations of HBOR, particularly Civil Code §§ 2923.5, 2923.7 and  
 8 2924.17, and are also preempted by HOLA. *Gorton, supra*, 2013 U.S. Dist. LEXIS  
 9 86006, at \*7-\*12; *Mata, supra*, 2013 U.S. Dist. LEXIS 108197, at \*7-\*18; *Marquez,*  
 10 *supra*, 2013 U.S. Dist. LEXIS 131364, at \*13-\*15. Finally, plaintiffs' sixth claim  
 11 relates to disclosures made or omitted during loan origination regarding material facts  
 12 and loan terms, including the interest rate, and is preempted by 12 C.F.R. § 560.2(b)(4),  
 13 (9) and (10). *Davis, supra*, 806 F. Supp. 2d at 167; *Garcia v. Wachovia Mortg. Corp.*,  
 14 676 F. Supp. 2d 895, 913 (C.D. Cal. 2009); *Andrade v. Wachovia Mortg.*, 2009 U.S.  
 15 Dist. LEXIS 34872, at \*8 (S.D. Cal. Apr. 21, 2009).

## 16      2. **PLAINTIFFS FAIL TO STATE A CLAIM FOR LACK OF STANDING**

17      In their Opposition, plaintiffs rely primarily on the Fifth District California Court  
 18 of Appeal decision in *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013)  
 19 and a Southern District Court decision in *Naranjo v. SBMC Mortgage*, 2012 U.S. Dist.  
 20 LEXIS 103735 (S.D. Cal. July 24, 2012) to support their claim for lack of standing.  
 21 (Opp. pp. 10:2-13:5). However, plaintiffs' reliance on these cases is inapposite. Both of  
 22 those decisions are very much minority views vastly outweighed by the overwhelming  
 23 majority of state and federal courts that have dismissed similar securitization claims as a  
 24 matter of law. *See Motion* at pp. 6:8-8-21). This Court should decline to follow the  
 25 outlier *Glaski* and *Naranjo* decisions, as have other state and federal courts. Indeed, "no  
 26 courts have followed *Glaski*, and *Glaski* is in a clear minority on this issue. . . . [T]his  
 27 court will continue to follow the majority rule." *Newman v. Bank of N.Y. Mellon*, 2013  
 28 U.S. Dist. LEXIS 147562, at \*9 n.2 (E.D. Cal. Oct. 11, 2013); *see also Diunugala v. JP*

1 *Morgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 144326 (S.D. Cal. Oct. 3, 2013)  
 2 (rejecting both reasoning and application of *Glaski*); *Cornell v. New Century Mortg. Corp.*, 2013 U.S. Dist. LEXIS 150391, at \*5 (E.D. Cal. Oct. 18, 2013) (“*Glaski* appears to reflect a minority view”); *Rossberg v. Bank of America*, 219 Cal. App. 4th 1481, 1493 (Cal. App. 4th Dist. 2013) (“A trustor-debtor seeking to prevent a nonjudicial foreclosure based on the foreclosing entity’s purported lack of authority therefore must ‘affirmatively’ plead facts demonstrating a lack of authority. A trustor-debtor may not bring a preemptive lawsuit seeking to force the foreclosing entity to prove its authority before it conducts a nonjudicial foreclosure. Allowing a judicial action to prevent a nonjudicial foreclosure without specific factual allegations showing a lack of authority would unnecessarily interject the courts into [the] comprehensive nonjudicial scheme created by the Legislature, and would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.”) (citations and internal quotations omitted). These cases, and those cited in Wells Fargo’s Motion, represent the “clear” majority view among California’s state and federal courts.

16 *Glaski* and *Naranjo* are also readily distinguishable. In both cases, there was no  
 17 dispute that the loan had been assigned from the original lender to a securitized trust, as  
 18 evidenced by specific allegations of such assignments and judicially noticeable  
 19 documents, but the manner of and participants in that transfer were unclear. In *Glaski*,  
 20 the plaintiff apparently offered detailed factual allegations bolstered by the conflicting  
 21 recorded foreclosure notices. See *Glaski*, 218 Cal. App. 4<sup>th</sup> at 1085-87. See also  
 22 *Naranjo*, 2012 U.S. Dist. LEXIS 103735, at \*1-\*5. Here, by contrast, the securitization  
 23 claims rest entirely upon the following conclusion: “Plaintiffs are informed and believe  
 24 and thereon allege that at the time Defendants caused the Notice of Default to be  
 25 recorded through commencement of foreclosure proceedings against Plaintiffs’ property,  
 26 the First Deed of Trust was securitized and split from the First Promissory Note and was  
 27 transferred into multiple classes of the WORLD SAVINGS BANK REMIC 31.” (FAC  
 28 ¶¶30). There are no specific factual allegations or judicially noticeable documents

1 supporting any assignment of plaintiffs' loan to the alleged securitized trust. Plaintiffs'  
 2 claim is based on sheer speculation, which is not entitled to an acceptance as truth. *See*  
 3 *Associated Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th  
 4 Cir. 1998) ("conclusory allegations of law and unwarranted inferences are not sufficient  
 5 to defeat a motion to dismiss."). Thus, courts are not bound to accept as true allegations  
 6 that are legal conclusions, even if cast in the form of factual allegations. *Ashcroft v.*  
 7 *Iqbal*, 556 U.S. 662, 884, 129 S.Ct. 1937 (2009). Further, nowhere in the FAC, do  
 8 plaintiffs allege that the securitized trust, World Savings REMIC 31 trust, or its trustee,  
 9 initiated or participated in the foreclosure proceedings. Nor do any of the foreclosure  
 10 documents refer to or name a securitized trust or the trustee of a securitized trust. In  
 11 fact, plaintiffs allege that Wells Fargo authorized NDEX West, LLC to initiate  
 12 foreclosure proceedings. (FAC ¶¶41-43). The recorded foreclosure documents reflect  
 13 this authorization and the fact that Wells Fargo was the beneficiary by virtue of the  
 14 name changes and merger. (RJN Exhs. D & E). Plaintiffs do not challenge the  
 15 succession of World Savings Bank, FSB to Wachovia Mortgage, FSB to Wells Fargo  
 16 Bank, N.A. through name change and merger, as set forth in judicially noticeable  
 17 documents. (RJN Exh. C). Thus, Wells Fargo became the beneficiary as a successor-in-  
 18 interest through merger, not by any assignment to a securitized trust. (Mtn. pp. 5:17-6:3;  
 19 RJN Exhs. A-C). Hence, there is no factual basis for plaintiffs' conclusion that Wells  
 20 Fargo lacks standing to foreclose.

21 Furthermore, in this case, the lack of standing argument is thoroughly  
 22 implausible. Plaintiffs contend that Wells Fargo has no rights vis-à-vis the loan; yet  
 23 plaintiffs also allege that (1) they received a trial period plan modification from a  
 24 division of Wells Fargo (FAC ¶18), (2) they repeatedly contacted Wells Fargo for a loan  
 25 modification (FAC ¶¶31-33), and (3) Wells Fargo failed to contact them to discuss their  
 26 financial situation prior to foreclosing (FAC ¶¶31-33).

27 Finally, plaintiffs contend that the assignment to the securitized trust is void.  
 28 (Opp. p. 12:8-9). Even if there was an assignment, which there was not, and it is void,

1 that does not affect Wells Fargo’s authority to foreclose. As briefed in the Motion (at  
2 pp. 8:22-9:26), and as stated by the Court in *Toneman v. United States Bank*, 2013 U.S.  
3 Dist. LEXIS 98996, at \*28-\*32 (C.D. Cal. June 13, 2013), “**even if plaintiffs are**  
4 **correct that the loan was not timely transferred to the trust, ‘that does not mean**  
5 **that the owner of the note and deed of trust could not therefore foreclose;’ rather,**  
6 **‘[t]hat would simply mean that the loan was not put into the trust (i.e., the**  
7 **investment vehicle).’”** Here, Wells Fargo’s ownership of the loan has nothing to do  
8 with the alleged securitized trust. Wells Fargo owns plaintiffs’ loan as a result of a  
9 merger with Wachovia Mortgage, formerly World Savings. (RJN Exh. C). Plaintiffs  
10 admit they obtained the loan from World Savings and executed a Note and Deed of  
11 Trust. (FAC ¶14). Thus, as the successor in interest to World Savings, Wells Fargo has  
12 absolute authority to foreclose following plaintiffs’ default. Hence, plaintiffs’ claim for  
13 lack of standing fails and should be dismissed without leave to amend. *See Fontenot v.*  
14 *Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272 (2011); *Bernardi v. JPMorgan*  
15 *Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 1951, at \*5 (N.D. Cal. Jan. 6, 2012).

**3. PLAINTIFFS FAIL TO STATE A CLAIM FOR WRONGFUL FORECLOSURE UNDER CIVIL CODE § 2923.55**

18 The Opposition does nothing to salvage plaintiffs' defective claim under Civil  
19 Code § 2923.55. In addition to being preempted by HOLA, plaintiffs' own allegations  
20 show that Wells Fargo assessed plaintiffs' financial situation and explored options to  
21 avoid foreclosure. (FAC ¶22). Thus, there were no violation of § 2923.55.

Further, plaintiffs' contention that the declaration of compliance attached to the Notice of Default is not evidence of compliance is misleading. (Opp. pp. 14:3-15:7). Wells Fargo discusses the declaration in direct response to plaintiffs' claim that Wells Fargo violated § 2923.55(c) because the declaration attached to the Notice of Default is a form declaration that does not (1) provide specific "facts as to the date and time of such 'contact'", (2) state the name of the representative who made contact with plaintiffs, or (3) establish that the declarant has personal knowledge of such facts. (FAC

1 ¶69).

2       Indeed, plaintiffs do not address any of the authority cited by Wells Fargo stating  
 3 that a declaration indicating compliance is all that is required prior to recording the  
 4 notice of default, and that the declaration does not have to specify the attempts to contact  
 5 the plaintiffs or be based on personal knowledge. *See Civ. Code § 2923.55(c); Mabry v.*  
 6 *Superior Court*, 185 Cal. App. 4th 208, 233, 235 (2010) (court held that a declaration  
 7 under former § 2923.5 is only required to track the language of the statute; it is not  
 8 required to be custom-drafted or explain the efforts made to contact the borrower or be  
 9 based on personal knowledge). Thus, plaintiffs fail to state a violation of Civil Code §  
 10 2923.55 based on the declaration attached to the Notice of Default.

11      **4. PLAINTIFFS FAIL TO STATE A CLAIM UNDER CIVIL CODE § 2924.17**

12       Plaintiffs' Opposition to Wells Fargo's motion to dismiss the third claim for  
 13 violation of Civil Code § 2924.17 does nothing to salvage this claim. Plaintiffs contend  
 14 that Wells Fargo violated § 2924.17 by failing to provide them with documents  
 15 requested in a purported Qualified Written Request. (Opp. pp. 15:8-16:15). Yet,  
 16 plaintiffs fail to explain how not providing them with a copy of the Note and Deed of  
 17 Trust shows that Wells Fargo did not have competent and reliable evidence to  
 18 substantiate their default and right to foreclose. As discussed in the Motion, such  
 19 contention does not state a violation of § 2924.17.

20       Moreover, plaintiffs do not allege any facts showing that Wells Fargo did not  
 21 review competent and reliable evidence to substantiate their default and the right to  
 22 foreclose. *See Cerecedes v. U.S. Bankcorp*, 2011 U.S. Dist. LEXIS 75559, at \*18 (C.D.  
 23 Cal. July 11, 2011) (the Court dismissed a § 17200 claim based on conclusory robo-  
 24 signing allegations, stating: "However, Rule 9(b) and *Twombly* require plaintiffs to set  
 25 forth more than bare allegations of "robo-signing" without any other factual support.  
 26 Perhaps more importantly, plaintiffs do not dispute that they defaulted on their loan or  
 27 that they received the notices required by Cal. Civ. Code § 2924. Under these  
 28 circumstances, the Court cannot say that plaintiffs state a claim under either the

1 fraudulent or unlawful prong of the UCL.”) (citing *Orzoff v. Bank of America, N.A.*,  
 2 2011 U.S. Dist. LEXIS 44408, 2011 WL 1539897, at \*2-3 (D. Nev. Apr. 22, 2011)  
 3 (holding that plaintiff failed to state a claim that trustee breached its duty by ‘robo-  
 4 signing’ documents related to plaintiff’s loan where plaintiff did not dispute that she  
 5 defaulted on her mortgage or that she received required notices); *Bucy v. Aurora Loan*  
 6 *Servs., LLC*, 2011 U.S. Dist. LEXIS 28191, 2011 WL 1044045, at \*6 (S.D. Ohio Mar.  
 7 18, 2011) (plaintiff failed to state a claim for fraud based on purported ‘robo-signing’  
 8 where ‘Plaintiff d[id] not dispute the accuracy of any of the salient facts, such as the  
 9 amount owed or the amount in default.’). Here, plaintiffs’ do not question their default,  
 10 and in fact, allege that they suffered a significant reduction in their income and sought  
 11 assistance from Wells Fargo so that they could continue to make their loan payments,  
 12 but to no avail. Plaintiffs allege that collection efforts were pursued and demands were  
 13 made for plaintiffs to bring their account current. (FAC ¶¶31-34). Plaintiffs do not deny  
 14 that they defaulted on their loan payments. Hence, there are no factual allegations in the  
 15 FAC to support a claim that Wells Fargo violated Civil Code § 2924.17.

## 16 5. **PLAINTIFFS FAIL TO ALLEGE A VIOLATION OF CIVIL CODE § 2923.7**

17 Plaintiffs clearly misread the requirements of Civil Code § 2923.7. In their  
 18 Opposition they correctly quote § 2923.7 as stating: “Upon request from a borrower who  
 19 requests a foreclosure prevention alternative, the mortgage servicer shall promptly  
 20 establish a single point of contact and provide to the borrower one or more direct means  
 21 of communication with the single point of contact. Civ. Code § 2923.7(a) (emphasis  
 22 added). Yet, they contend that they requested a loan modification in January 2013, and  
 23 therefore, Wells Fargo was required to appoint a single point of contact. (Opp. p. 17:6-  
 24 20). However, the statute uses the word “request” twice. It is not simply redundant. It  
 25 means if a borrower, who has requested a foreclosure prevention alternative, requests a  
 26 single point of contact, then the servicer must assign a single point of contact. Thus,  
 27 Civil Code § 2923.7 only requires the servicer to establish a single point of contact if the  
 28 borrower requests one. Here, plaintiffs make it clear that they did not request a single

1 point of contact. They only requested a foreclosure prevention alternative. Thus, there  
 2 was no violation of Civil Code § 2923.7. Moreover, if they were informed that they did  
 3 not qualify for a modification and could not apply under HARP, what was the need for a  
 4 single point of contact? Thus, plaintiffs fail to allege any violation of section 2923.7,  
 5 and certainly have not alleged a material violation.

## 6. **PLAINTIFFS FAIL TO STATE A CLAIM UNDER RESPA**

### 7. **A. The June 26, 2013 Letter Is Not An Actionable QWR.**

8 Plaintiffs attempt to establish the June 26, 2013 letter sent to Wells Fargo as a  
 9 QWR by totally ignoring the fact that the letter is more than 15 pages demanding  
 10 production of an extensive list of document categories and responses to questions about  
 11 the origination, supposed securitization, and other general information the loan. (Comp.  
 12 Exh. 2). As numerous courts have found with similar requests, this is an improper  
 13 attempt at discovery and does not qualify as an actionable QWR.

14 As the court in *Wende v. Countrywide Home Loans*, 2012 U.S. Dist. LEXIS  
 15 25503, at \*11-\*12 (S.D. Cal. Feb. 28, 2012) explained:

16 Plaintiff effectively demands anything that relates to his loan from its  
 17 inception through July 2009, and in some requests, beyond. Such  
 18 requests lack sufficient detail under RESPA and do not fall within its  
 19 confines. *See, e.g., Junod v. Dream House Mortg. Co.*, No. CV 11-  
 20 7035, 2012 U.S. Dist. LEXIS 3865, 2012 WL 94355, at \*4 (C.D. Cal.  
 21 Jan. 5, 2012) (dismissing RESPA claim because plaintiff's alleged  
 22 QWR requests did not relate to loan servicing and because the requests  
 23 fell outside the scope of RESPA); *Derusseau v. Bank of Am., N.A.*, No.  
 24 11 CV 1766, 2011 U.S. Dist. LEXIS 136508, 2011 WL 5975821, at \*4  
 25 (S.D. Cal. Nov. 29, 2011) (finding that a QWR that requests "anything"  
 26 related to the loan is not covered by § 2605).

27 Here, plaintiffs' letter was similar to the letters in *Wende* and *Junod*. Plaintiffs  
 28 cannot dispute that the June 26, 2013 letter effectively seeks all information that relates  
 29 to the loan since its inception. *See* Mot. pp. 14:10-15:13 (citing letter and quoting  
 30 excerpts thereof). The above-cited authorities, among others, demonstrate that such  
 31 letter cannot serve as the basis of a RESPA claim and Wells Fargo was not required to

1 respond.

2 Moreover, plaintiffs fail to allege any actual damages resulting from the alleged  
3 RESPA violations. Although the case cited by plaintiffs questioned whether RESPA  
4 requires allegations of pecuniary damages, it recognized that numerous courts require  
5 such allegations. *Agustin v. PNC Fin. Servs. Grp., Inc.* 707 F. Supp. 2d 1080, 1091 (D.  
6 Haw. 2010). Indeed, Wells Fargo cited several other cases requiring a plaintiff to plead  
7 actual pecuniary damages to state a RESPA claim. *Tasaranta v. Homecomings Fin.*,  
8 2009 U.S. Dist. LEXIS 87372, at \*11 (S.D. Cal. Sept. 21, 2009) (“Plaintiffs do not  
9 allege any damage as a result of the alleged failure to provide the required notice. See 12  
10 U.S.C. § 2605(f)(1) (borrow can recover ‘any actual damages to the borrow as a result of  
11 the failure’.”); *Jelsing v. MIT Lending*, 2010 U.S. Dist. LEXIS 68515, at \*5 (S.D. Cal.  
12 July 9, 2010) (Conclusory allegations that plaintiffs “were harmed and were unable to  
13 evaluate the Loans or correct their account” held insufficient to plead damages, an  
14 essential element of a RESPA claim”); *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp.  
15 2d 1089, 1097 (N.D. Cal. 2009) (“Allen only offers the conclusory statement that  
16 ‘damages consist of the loss of plaintiff’s home together with his attorney fees.’ Compl.  
17 P 38. He has not actually attempted to show that the alleged RESPA violations caused  
18 any kind of pecuniary loss (indeed, his loss of property appears to have been caused by  
19 his default.”). This Court should follow the majority of courts requiring allegations of  
20 actual damages caused by the alleged RESPA violation.

21 Here, plaintiffs do not plead any damages resulting from the alleged failure to  
22 respond to the July 26, 2013 letter. Plaintiffs’ Opposition fails to show how the alleged  
23 failure to provide a copy of the Note and Deed of Trust caused plaintiffs to incur  
24 expenses to clear title to the Property. (Opp. p. 6-10; FAC ¶107). As stated in the  
25 Motion, plaintiffs admit that they obtained the loan for \$368,000.00 and signed the Note  
26 and Deed of Trust in 2007. (FAC ¶14). Thus, they admit to creating a cloud (lien) on  
27 their title. Plaintiffs do not allege that they paid off the loan, and in fact, admit that they  
28 suffered a reduction in income which affected their ability to make their loan payments.

1 Thus, plaintiffs fail to plead actual damages resulting from Wells Fargo's alleged failure  
2 to provide copies of the Note and Deed of Trust.

**7. PLAINTIFFS FAIL TO STATE A CLAIM FOR FRAUD IN THE  
INDUCEMENT**

In the Opposition, plaintiffs seek to avoid the obvious statute of limitations by concluding that “Defendants continued to actively conceal and misrepresent facts to Plaintiffs through at least November 2011.” (Opp. p. 20:18-27). However, just like in the FAC, plaintiffs fail to allege any facts showing what was concealed and how it was concealed. Indeed, plaintiffs claim they were fraudulently induced into entering into the loan on September 23, 2007 and that defendants “falsely asserted to Plaintiffs that their interest rate and payments would be fixed for five (5) years.” (FAC ¶111). Yet, plaintiffs allege that the loan increased after the first year. (FAC ¶15). Thus, according to plaintiffs, in 2008, they became aware of facts that put them on notice of any alleged misrepresentation. Therefore, plaintiffs’ fraud claim was barred after 2011. Since they did not file the Complaint until November 21, 2013, the claim is time-barred.

16 Moreover, plaintiffs still do not provide the specificity required under Rule 9(b).  
17 The Opposition simply repeats the allegations in the FAC, which as briefed in the  
18 Motion (at pp. 19:5-21:15) fail to satisfy the specificity requirements. Not only do  
19 plaintiffs fail to provide the names and authority of any of the alleged representatives,  
20 they fail to plead any actionable or false representations that resulted in damage to  
21 plaintiffs. Wells Fargo did not cause plaintiffs to default on their loan. Nor did it make  
22 any false representations. Plaintiffs allege that they were told if they were having  
23 problems they could call and renegotiate the loan or refinance. Plaintiffs allege that they  
24 accepted a trial period plan modification. Thus, there was no false representation.

Further, the general rule with respect to fraud claims is that opinions are not actionable. "The law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action. (BAJI No. 12.32; see generally 5 Witkin, Summary of Cal. Law (9th ed. 1988)

1 Torts, § 678, pp. 779-780 .)” *Neu-Visions Sports v. Soren*, 86 Cal. App. 4th 303, 308  
 2 (2000); *see also Padgett v. Phariss*, 54 Cal. App. 4th 1270, 1284 (1997) (real estate  
 3 broker's opinion as to fair market value of real property not actionable). “Moreover, the  
 4 representation must ordinarily be about past or existing facts; predictions about future  
 5 events, or statements about future action by some third party, are deemed opinions, and  
 6 not actionable fraud.” 5 Witkin Sum. Cal. Law Torts § 774 (10th Ed. 2008) (citations  
 7 omitted); *see also Garcia v. Ocwen Loan Serv'g, LLC*, 2010 U.S. Dist. LEXIS 45375, at  
 8 \*5-\*6 (N.D. Cal. May 6, 2010) (lender's statements regarding modification of a loan  
 9 were not actionable because the “alleged misrepresentations involve promises regarding  
 10 future events rather than representations of past or existing facts.”); *Neu-Visions Sports*,  
 11 86 Cal. App. 4th at 307 (alleged misrepresentations about value of property to be used to  
 12 obtain loan and whether lessor would have clear title at time of financing were opinions  
 13 about future events). Here, plaintiffs allege nothing more than an opinion by unnamed  
 14 individuals about future events or actions by a third party (i.e. the ability of plaintiffs to  
 15 renegotiate or refinance the loan in the future). Thus, plaintiffs’ claim is not actionable.

16 Moreover, plaintiffs fail to allege any reliance resulting in damages. Plaintiffs do  
 17 not allege that Wells Fargo caused them to default on their loan or prevented them from  
 18 reinstating their loan. They also fail to explain how making modified payments (paying  
 19 less than originally owed) caused them damages. *See Rossberg v. Bank of America*,  
 20 N.A., 219 Cal. App. 4th 1481, 1499-1500 (2013) (“Significantly, the Rossbergs do not  
 21 allege their reliance on the promised loan modifications caused them to default on their  
 22 loans or prevented them from curing their existing defaults. In short, the Rossbergs  
 23 failed to allege any connection between their reliance on the promised loan  
 24 modifications and any specific damages that reliance caused. … Moreover, the  
 25 Rossbergs fail to explain how continuing to pay on their loans caused them damages  
 26 when BofA credited those payments toward the amount they undisputedly owed and  
 27 allowed them to remain in their home.”); *Reyes v. Wells Fargo Bank, N.A.*, 2011 U.S.  
 28 Dist. LEXIS 2235 (N.D. Cal. Jan. 3, 2011) (“It is well established that where the money

1 paid under an agreement was already owed under a prior agreement, it is not  
 2 consideration and cannot support a claim for damages”).

3 Finally, plaintiffs are required to tender the indebtedness. In the Opposition,  
 4 plaintiffs contend a tender requirement is inappropriate because this case arose pre-  
 5 foreclosure, citing cases in support thereof. However, plaintiffs fail to address the fact  
 6 that the remedy for fraud in the inducement is rescission of the contract, which  
 7 necessarily requires restoration of the amount due on the loan. Civ. Code §§ 1689 &  
 8 1691; *Touli v. Santa Cruz County Title Co.*, 20 Cal. App. 2d 495, 499-500 (1937) (“one  
 9 is not entitled to relief in a court of equity who refuses to do equity on his part”; court  
 10 held one cannot rescind a contract without restoring everything of value he received).  
 11 Here, plaintiffs have not tendered what is owed on the loan, nor do they plead an ability  
 12 to do so. Therefore, plaintiffs’ fraud in the inducement claim fails.

#### 13 **8. PLAINTIFFS’ BREACH OF IMPLIED COVENANT CLAIM FAILS**

14 Nothing in the Opposition salvages plaintiffs’ fatally deficient claim for breach of  
 15 implied covenant of good faith and fair dealing. As stated in the Motion (at p. 22:6-8),  
 16 plaintiffs fail to plead any facts showing how Wells Fargo unfairly interfered with their  
 17 right to receive the benefits of the Note and Deed of Trust. As was done in the FAC, the  
 18 Opposition simply reasserts the allegations which form the basis of their other claims.  
 19 (Opp. p. 23:18-24). Since the breach of implied covenant claim echoes plaintiffs’ other  
 20 claims, it fails on the same grounds and is duplicative.

21 Moreover, plaintiffs fail to address any of the other substantive arguments raised  
 22 in the Motion (at pp. 22:15-23:9), and therefore concede such arguments. Namely, that  
 23 there is no provision in the contract limiting the assignment of the loan, requiring their  
 24 consent, or requiring the exploration of options to avoid foreclosure or assessing  
 25 plaintiffs’ financial situation. Plaintiffs agreed to a future assignment of the loan. (Mot.  
 26 p. 22:15-24; RJN Exhs. A, p. 1, ¶1 and B, p. 1, ¶1(C), p. 8 ¶11). An implied covenant  
 27 claim cannot be based on extra-contractual statutory duties. Nor can it prevent Wells  
 28 Fargo from taking action it was expressly permitted to do under the loan agreement, *i.e.*

1 non-judicial foreclosure. (RJN Exh. B – DOT ¶28, p. 13). *See Carma Developers, Inc.*,  
 2 Cal. 4th at 374 (implied terms should never be read to vary express terms). Finally,  
 3 plaintiffs admit that they breached the loan agreement. (FAC ¶¶31-32, 34).

4 Accordingly, plaintiffs fail to state a claim for breach of the implied covenant of  
 5 good faith and fair dealing.

6 **9. PLAINTIFFS FAIL TO STATE A VIOLATION OF BUSINESS &**  
 7 **PROFESSIONS CODE § 17200 ET SEQ.**

8 In their Opposition, plaintiffs confuse the standing requirement with the  
 9 requirement to state a basis for a claim for violation of Business & Professions Code §  
 10 17200 relying on *Glaski, supra*, 218 Cal. App. 4<sup>th</sup> at 1101. (Opp. p. 24:4-24). Yet, here,  
 11 plaintiffs fail to allege either requirement. It is clear that the § 17200 is based on their  
 12 other claims for relief, particularly the void transfer. (Opp. p. 24:8-9, 19-22). Thus, as  
 13 briefed above and in the Motion, since those claims fail, plaintiffs’ § 17200 claim also  
 14 fails. *Williams v. Wells Fargo Bank, NA*, 2013 U.S. Dist. LEXIS 68615, at \*13 (C.D.  
 15 Cal. May 13, 2013) (“Plaintiff’s pleadings fail to allege any unlawful business practices  
 16 that are not tied to his already-dismissed Section 2923.5 claim, and so this claim must be  
 17 dismissed.”); *Cerecedes v. U.S. Bankcorp*, 2011 U.S. Dist. LEXIS 75559, at \*15-\*17  
 18 (C.D. Cal. July 11, 2011) (Section 17200 claim dismissed where plaintiffs failed to  
 19 allege an independent claim for violations of California’s non-judicial foreclosure  
 20 scheme, Cal. Civ. Code §§ 2923.5, 2924-29241).

21 Moreover, plaintiffs fail to plead any facts showing they suffered injury in fact  
 22 and lost money and property as a result of any conduct by Wells Fargo in violation of §  
 23 17200. Nor does the Opposition challenge the fact that any injury and loss would have  
 24 been caused by plaintiffs’ failure to make the mortgage payments as promised.

25 **10. PLAINTIFFS’ CLAIM FOR DECLARATORY RELIEF FAILS**

26 Plaintiffs’ Opposition does nothing to salvage the defective claim for declaratory  
 27 relief. It is settled that a claim for declaratory relief is not to be used for the purpose of  
 28 determining an issue which can be determined in the main action. The object is “not to

1 furnish a litigant with a second cause of action for the determination of identical issues.”  
 2 *Cal. Ins. G’tee Assn. v. Sup. Ct.*, 231 Cal. App. 3d 1617, 1623-1624 (1991). Indeed,  
 3 where the language of the declaratory relief claim shows that it was wholly derivative of  
 4 the other causes of action, such claim is properly dismissed. *Swartz v. KPMG LLP*, 476  
 5 F.3d 756, 765-66 (9th Cir. 2007) (“To the extent [plaintiff] seeks a declaration of  
 6 defendants’ liability for damages sought for his other causes of action, the claim is  
 7 merely duplicative and was properly dismissed.”); *Ochs v. PacifiCare of Cal.*, 115 Cal.  
 8 App. 4th 782, 794 (2004).

9 Here, plaintiffs’ declaratory relief claim is merely duplicative of the first claim  
 10 disputing Wells Fargo’s standing, and as briefed above, it fails to state a viable claim  
 11 against Wells Fargo. Thus, there is no “ongoing controversy” between the parties and  
 12 the ninth claim for relief should be dismissed.

13 Moreover, as numerous courts have recognized, declaratory relief is a remedy, not  
 14 an independent claim for relief. *Javaheri, v. JPMorgan Chase Bank, N.A.*, 2012 U.S.  
 15 Dist. LEXIS 114510, at \*23-\*24 (C.D. Cal. Aug. 13, 2012) (“Claims for declaratory and  
 16 injunctive relief are ultimately prayers for relief, not causes of action. [Plaintiff] is not  
 17 entitled to such relief absent a viable underlying claim.”); *Pazargad v. Wells Fargo  
 18 Bank, N.A.*, 2011 U.S. Dist. LEXIS 94850, at \*6-\*7 (C.D. Cal. Aug. 23, 2011)  
 19 (“Declaratory relief is not an independent claim, rather it is a form of relief.”); *Santos v.  
 20 Countrywide Home Loans*, 2009 U.S. Dist. LEXIS 103453, at \*13 (E.D. Cal. Nov. 6,  
 21 2009) (“Declaratory and injunctive relief are not independent claims, rather they are  
 22 forms of relief.”). Further, a motion to dismiss is appropriately granted if the facts (as  
 23 pled or judicially noticed) establish that a plaintiff has no right to the declaration sought.  
 24 *United States v. Washington*, 759 F.2d 1353, 1353 (9th Cir. 1985). Here, as discussed  
 25 above and in the Motion, no controversy exists for which this Court can grant relief.

## 26      **11. PLAINTIFFS FAIL TO STATE A CLAIM FOR QUIET TITLE**

27 Plaintiffs fail to state any legal or factual basis to quiet title in their favor.

28 Contrary to plaintiffs’ contentions, lack of authority to foreclose and violations of Civil

1 Code §§ 2923.55 and 2924 do not provide a basis for plaintiffs to quiet title to the  
 2 subject property. Further, plaintiffs admit that they signed a Deed of Trust securing the  
 3 loan they obtained from World Savings. (FAC ¶14). As discussed above and in the  
 4 Motion, Wells Fargo owns plaintiffs' loan as the successor in interest to Wachovia  
 5 Mortgage, formerly World Savings, the original lender. Thus, Wells Fargo clearly has a  
 6 legal interest in the property.

7 Moreover, plaintiffs' failure to tender the indebtedness conclusively defeats their  
 8 claim for quiet title. Their reliance upon cases excusing tender is to no avail because  
 9 such cases involve efforts to challenge foreclosure proceedings. Here, plaintiffs seek to  
 10 quiet title against their lender, and as the California Supreme Court made clear: "It is  
 11 settled in California that a mortgagor cannot quiet his title against the mortgagee without  
 12 paying the debt secured." *Shimpones v. Stickney*, 219 Cal. 637, 649 (1934). In *Aguilar*  
 13 v. *Bocci*, 39 Cal. App. 3d 475, 477 (1974), the plaintiff owed a debt to the defendant,  
 14 which was secured by real property, and the court noted that the borrower cannot quiet  
 15 title without discharging his debt. "The cloud upon his title persists until the debt is  
 16 paid." *Id.* at 477-78. This has also been confirmed by the District Court in *Rosenfeld v.*  
 17 *JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 975 (N.D. Cal. 2010) (citation  
 18 omitted), which held that, "it is dispositive as to this claim that, under California law, a  
 19 borrower may not assert 'quiet title' against a mortgagee without first paying the  
 20 outstanding debt on the property", noting that "[a] basic requirement of an action to  
 21 quiet title is an allegation that plaintiffs 'are the rightful owners of the property, i.e., that  
 22 they have satisfied their obligations under the deed of trust.'"

23 Here, plaintiffs' case is not distinguishable on any notable ground. Plaintiffs  
 24 admittedly owe a debt secured by real property, and breached their contract by failing to  
 25 make the loan payments, entitling Wells Fargo to foreclose on the security property.  
 26 Plaintiffs cannot seek the aid of equity to quiet title without discharging their debt.  
 27 Indeed, there is nothing inequitable about requiring plaintiffs to satisfy their loan before  
 28 they are entitled to have title to the property quieted in their favor.

## **12. CONCLUSION**

2 For the foregoing reasons, as well as those stated in the Motion, Wells Fargo  
3 respectfully requests an order dismissing the first through tenth claims for relief in the  
4 FAC without leave to amend as any effort to amend would be futile. While plaintiffs  
5 make a conclusory request for leave to amend, they offer no explanation how they  
6 would cure defects in the FAC. In such circumstances, leave to amend should be  
7 denied. *See U.S. Care, Inc. v. Pioneer Life Ins. Co.*, 244 F. Supp. 2d 1057, 1061, 1065  
8 (C.D. Cal. 2002) (“Plaintiff has requested that if the court grants Defendants’ motion,  
9 the court allow Plaintiff to amend the Complaint. Plaintiff has not suggested that it can  
10 allege additional facts which support its claim for relief. ‘[A] bare request in an  
11 opposition to a motion to dismiss -- without any indication of the particular grounds on  
12 which the amendment is sought -- does not constitute a motion within the contemplation  
13 of Rule 15(a).’ Accordingly, the court DENIES Plaintiff’s request to amend the  
14 Complaint.”) (citations omitted).

Respectfully submitted,

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merger with Wells Fargo Bank Southwest, N.A.,  
f/k/a Wachovia Mortgage, FSB, f/k/a WORLD  
SAVINGS BANK, FSB (also erroneously sued  
separately as WORLD SAVINGS BANK, FSB)

## **CERTIFICATE OF SERVICE**

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of Pasadena, California; my business address is 199 S. Los Robles Avenue, Suite 600, Pasadena, California 91101-2459.

On February 24, 2014, I served the foregoing document entitled:

**REPLY IN SUPPORT OF DEFENDANT WELLS FARGO'S MOTION TO  
DISMISS FIRST AMENDED COMPLAINT**

on the interested parties in said case as follows:

**Served Electronically Via The Court's CM/ECF System:**

*Counsel for Plaintiffs  
Marques Houston and Alma Houston.*

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. This declaration is executed in Pasadena, California, on February 24, 2014.

Jill Ashley  
(Type or Print Name)

/s/ Jill Ashley  
(Signature of Declarant)